In The
Supreme Court of the United States

October Term, 1970

NO. 678

MARY JULIA PARKIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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I.

Throughout Respondent's brief the theme is asserted (Resp. Br. 2, 3, 4, 20) that the insanity defense is something the defendant has *elected* to raise, and having done so the defendant is barred from exercising her right against self incrimination with respect to that issue. This thesis is unsound. It overlooks the fact that the State initiates the prosecution and has the burden of proving every element of guilt, including the element that the defendant had the nec-

essary criminal intent to commit the crime. To carry such theory to a logical conclusion the defendant who *elects* a defense of self defense may be compelled to submit to an interrogation concerning that defense; the defendant who *elects* to rely upon a defense of alibi may be compelled to submit to a pre-trial examination concerning that defense; a defendant who *elects* a defense of entrapment may be compelled to submit to a pre-trial examination concerning entrapment. . . a defendant who *elects* to plead not guilty may be barred from exercising his right against self incrimination.

II.

Respondent also attempts to divert attention from the real issue by suggesting (Resp. Br. 24, 28) that the issue is moot. The reason given by Respondent is that the prosecutor, under Florida procedure, §27.04 Florida Statutes, can subpoena the defendant's psychiatrist to a pretrial inquiry and discover what the defendant has told her psychiatrist (engaged by defendant's attorney for his expert advice). The Respondent makes a positive conclusion:

> "We again remind this Court that it is an absolute certainty that Florida will come by this information (what she told her psychiatrist) whether we get it from her directly to our psychiatrist, or whether we get it from her psychiatrist on the business end of a subpoena." (Resp. Br. 28)

This concept is not involved here because none of the opinions of the Florida courts is based upon it -- it is not even discussed in the opinions. Even so, Respondent's theory is erroneous for several reasons:

(1) No Florida court has ever held that such procedure (pretrial discovery of attorney's work product) is available to the prosecution in a criminal case. To the contrary, in civil cases the theory is disapproved. *Ford Motor Company vs. Cochran*, 205 So.2d 551 Fla. 2nd D.C.A. 1967); *Hartstone Concrete Products vs. Ivancevich*, 200 So. 2d 234 (Fla. 2nd D.C.A. 1967); *Dade County vs. Bosch*, 133 So.2d 570 (Fla. 3rd D.C.A. 1961). Also see, 86 A.L.R. 2nd 138, "Pretrial Depositions -- Discovery of Opinions of Opponent's Expert Witnesses"

(2) If such procedure is available to the prosecution, the fact that the psychiatrist can be deposed does not mean that the defendant can also be deposed, no more than a defendant who has given a statement to the police can be said to be thereafter subject to compulsory pretrial prosecutorial interrogation.

(3) The Respondent presumes the defendant has given to her psychiatrist a detailed statement of all factual matters relative to the alleged crime. This presumption is not necessarily valid.

(4) The defendant cannot be protected from the prosecution's use of information discovered through the psychiatric interrogation to supply evidence of guilt not related to the defense of insanity.

Respectfully submitted,

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